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Supreme Court of the United States

OCTOBER TERM, 1945

Nos. 772 - 773

WILLIAM V. BICANIC, FRANK AKAR, GEORGE ELICH, CARL MOE, MARTIN WONSKI, MARTIN DYBEVICK AND NIKOLA GROSDANICH, IN BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

J. C. CAMPBELL COMPANY, A CORPORATION,

Respondent.

HARRY CZUPIY, STEVE GESWINE, WALTER L. CARLSON, JOSEPH SKALA, JR., JOHN STIMAC, JACOB MACIAG, AILI WAPOLA, ERICK HELLMAN, MAYNARD L. SCHNEIDER, ANDREW ALSZEWSKI, ALEX KANGAS, JOHN NESLAND, NIKOLA GROSDANICH, ELMER OSOFF, CHARLES A. MUELLER, JOSEPH SCHONE, VICTOR CARLSON, EDWARD ANDRESEN, CHARLES WAPOLA, CARL E. MANYBERG, DAVID McMILLEN, IN BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

NORTH STAR TIMBER COMPANY,

Respondent.

PETITION FOR WRITS OF CERTIORARI AND BRIEF

LEE PRESSMAN
FRANK J. DONNER,
HENRY PAULL,
M. H. GREENBERG,
Counsel for Petitioners.

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PETITION FOR WRITS OF CERTIORARI AND BRIEF

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully show that they seek herein a review by this Court of the final judgments of the Supreme Court of Minnesota, Court of last resort of that State, affirming judgments of the District Court of the Eleventh Judicial District, St. Louis County, Minnesota, docketed June 6, 1945,

for respondents each for fifty & 40/100 ($50.40) Dollars, in petitioners' actions under the *Fair Labor Standards Act* of June 25, 1938, Chapter 676, 52 Stat. 1060, 29 U.S.C. Section 201, to recover unpaid overtime compensation while employed as cooks, cookees, and bullcooks in a lumber camp in interstate commerce by respondents.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The undisputed facts most favorable to respondents[1] are as follows:

During the period from on or about December 3, 1940, to on or about April 7, 1943, each respondent was a corporation licensed and doing business in the State of Minnesota and was engaged in the business of cutting, hauling, sap-peeling and skidding pulpwood and timber in northern Minnesota, and especially in Lake County, Minnesota (1 R. 312; 2 R. 365). All of the pulpwood was sold and delivered within and outside of the State of Minnesota, the vast majority of such shipments being sold and delivered outside of the State of Minnesota. (1 R. 312; 2 R. 365).

Each respondent operated lumber camps where it was engaged in getting out pulpwood (1 R. 313; 2 R. 365). To facilitate and as a necessary part of this business of cutting, skidding, sap-peeling, loading and hauling pulpwood and logs each respondent maintained and operated camps in Lake County, Minnesota, which camps included bunk houses and cook houses. Such maintenance and operation of said bunk houses and cook houses were necessary to the proper and efficient operation of the work of each respondent in producing pulpwood and logs (1 R. 313; 2 R. 367).

Petitioners and others were employed by the respective respondents in the capacity of either cook, cookee or bullcook. All of the petitioners customarily started work at 4:00 A. M. and stopped work at 7:00 P. M. and for two hours of this period received no overtime compensation. (1 R. 51-58; 2 R.

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[1] Both cases rest upon the same facts. Both were tried subject to a stipulation "that the testimony introduced in either case should be considered as the testimony in both cases" (1 R. 311; 2 R. 364). In this petition the records in the *North Star* and *Campbell* cases will be referred to as "1 R. —" and "2 R. —", respectively.

58-64.) The duties of the cook in said camps usually consisted of starting the fires in the cook house in the morning, preparing food for 6 o'clock breakfast, preparing food for the men to take with them for their lunch at noon, doing whatever baking was necessary or advisable, preparing 11 o'clock lunch for those employees who were not in the woods, preparing the evening meal, generally having charge of the kitchen, cutting the meat when necessary, and putting away the food and keeping the kitchen and the food clean and sanitary (1 R. 313; 2 R. 367).

The cookees were generally required to assist the cook when necessary, put food on the table, clear the table and wash the dishes and cooking utensils, and put them away (1 R. 313; 2 R. 367-8).

The bullcooks were generally required to have plenty of wood on hand for the stoves, build fires in the bunk houses, and when needed, keep the lamps in condition for use and light them when needed, get necessary water to the different buildings, sweep the buildings and scrub the floors when necessary, and in general to do the janitor work around the bunk houses (1 R. 313-4; 2 R. 368).

The bunk houses and cook houses were for the use of the employees of each company (1 R. 314; 2 R. 368).

During all of the time these various petitioners worked for the respective respondents they were working under a contract between the employer and the union to which they belonged, which provided the rate of pay that they should receive per hour and the number of hours available to them to work (2 R. 225-6, 230). They were paid on the basis of the hours to be made available, both straight time and overtime, and the rate of wages fixed in the contract was not in any case below the minimum to be paid according to the provisions of the *Fair Labor Standards Act.*

Liability of each respondent is predicated upon the failure of each respondent to pay the petitioners for all of the hours worked under the *Fair Labor Standards Act,* since apart from the lunch hour for which no claim for compensation is made, the employees were employed within the meaning of the

Fair Labor Standards Act 14 hours and were paid for 12 hours.

After the issuance of a bulletin by the Fair Labor Standards Administrator holding that the employees involved herein were subject to the overtime provision of the *Fair Labor Standards Act* contracts were entered into between the Union representing petitioners and the respective respondents translating their monthly wage rate into an hourly basis but so as to yield the same amount as petitioners had been theretofore paid (2 R. 225-6, 230, 255, 257). These contracts specified the hours available for overtime purposes as 12 hours.

In 1943, the Circuit Court of Appeals for the Eighth Circuit handed down a decision in *Hanson* v. *Lagerstrom*, 133 F. (2d) 120, upholding the applicability of the *Fair Labor Standards Act* to petitioners. Prior to that time petitioners had failed to claim payment of the disputed hours. Claims were made, however, subsequent to that time.

Questions Presented:

1. Whether a court is justified in denying a claim for overtime compensation because the contract of their labor organization described above limited the hours available to 12 although petitioners in fact worked 14 hours.
2. Whether a court is justified in denying a claim for overtime to petitioners who in fact were suffered and permitted to work overtime hours either because petitioners failed to claim payment for such hours or because they were not required to work such hours.
3. Whether petitioners should be paid for time "on the job" whether or not it was necessary for them to do any work.

Reasons Relied Upon for the Allowance of the Writs

The Supreme Court of Minnesota has decided a Federal question of substance in a way not in accordance with the applicable decisions of this Court, and in that connection error is assigned and reasons presented for the allowance of the writ, as follows:

1. The trial court found that the petitioners had a period of two or more hours a day "available" as free time (1 R. 315,

2 R. 369) and that they were "able" to perform their work in the "hours available under the contract". The Minnesota Supreme Court held there was evidence to support this finding and that it would not substitute its judgment for that of the trial court (19 N. W. (2d) 7, 11). But the measure of hours worked under the *Fair Labor Standards Act* is not the hours within which employees are able to work but the hours within which they are in fact suffered or permitted to work. *Butler* v. *Carter,* 8 WHR 92, decided January 6, 1945 (Ga. Sup. Ct.); *Pinkley* v. *Allied Oil Corporation,* 8 WHR 434, decided March 5, 1945 (Ill. App. Ct.).

2. The trial court relied on the union contract to show that the petitioners were not *required* to work the full elapsed time and did not pass on the question whether in fact they were suffered or permitted to work and did work during the entire elapsed time.

More importantly, the trial court ignored the fact that the purpose of the contract was to translate previous monthly earnings into an hourly basis and was not intended to define hours worked for purposes of the *Fair Labor Standards Act.* The term "hours available" used in the contract to define the overtime period to be worked did not contemplate a scheduled period of free time and was wholly arbitrary in character. *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419; *Walling* v. *Harnishfeger Corp.,* 325 U. S. 427.

3. Petitioners failed to present claims for overtime compensation for the hours in dispute because of doubt as to the applicability of the *Fair Labor Standards Act.* After the decision in the case of *Hanson* v. *Lagerstrom, supra,* these claims were presented. The trial court justified its failure to find respondents liable for the hours in dispute which were worked because no claim had been presented during the period in dispute. This is an erroneous view of the law. See *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572, 582, 583.

4. With respect to those petitioners who did not in fact perform physical work during the hours in dispute, the Supreme Court of Minnesota has overlooked or ignored the controlling

decisions of this Court which have not been distinguished, modified, or overruled, to wit: *Armour & Company* v. *Wantock et al* (1944) 323 U. S. 126 and *Skidmore* v. *Swift & Company* (1944) 323 U. S. 134.

The Supreme Court of Minnesota has apparently overlooked the statement made by the trial court in its memorandum as follows (2 R. 374):

> "It seems to me the question resolves itself largely into whether or not men should be paid for time on the job during which it was not necessary for them to do any work, . . ."

The trial court itself used the expression "on the job". In the *Armour* case, Mr. Justice Jackson said in part:

> "We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging heavy on the employees' hands and because the employer and employee cooperated in trying to make the confinement and idleness incident to it more tolerable. Certainly they were competent to agree, expressly or by implication, that an employee could resort to amusements provided by the employer without a violation of his agreement or a departure from his duty. Both courts below having concurred in finding that under the circumstances and the arrangements between the parties the time so spent was working time; we therefore affirm."

The Supreme Court of Minnesota has overlooked or ignored the proper test in making its decision in determining whether the petitioners were entitled to pay for all of the hours claimed. The trial court in its memorandum stated that the question resolved itself largely into whether or not men should be paid for time on the job during which it was not necessary for them to do any work. The court stated that the men were on the job; and, even though they did not work, it is now established by the decisions cited above that that time is hours worked under the *Fair Labor Standards Act*.

Petitioners do not believe that the mere fact that they were not subject to call and would be unrebuked if they were unavailable justifies a denial of liability. Those periods of rest

snatched by petitioners were not fixed or scheduled exclusions from working hours, but had to be snatched from between tasks which governed the amount of rest which could be claimed. The fact that during the day there was a temporary lull in the work of some of the petitioners does not remove their service during this time from the scope of the *Wantock* and *Skidmore* cases. This is so because the rest periods insofar as they existed were inextricably part of and shaped by the work pattern.

5. The Supreme Court of Minnesota has failed to take into consideration the fact that the trial court did not have the opportunity of seeing the witnesses or hearing their testimony and in fact was itself a court of review. The trial court stated in its findings (2 R. 376):

> "This Court did not have the opportunity of seeing the witnesses or hearing their testimony, so this decision is made upon the bare record."

6. The Supreme Court of Minnesota failed to reconcile the present case with the decisions of the United States Supreme Court cited above when it stated in its opinion:

> "Although the record would support findings to the contrary, there is ample evidence to support the findings made, and they must be sustained even though this court might be inclined to draw contrary inferences from the evidence and come to a different conclusion. *Sommers* v. *City of St. Paul,* 183 Minn. 545, 237 N. W. 427. Even if it were both proper and possible to determine and consider the attitude of Judge Fesler and to determine that he would have made a contrary decision, it would serve no purpose other than to illustrate that, upon the evidence, reasonable minds might justifiably come to different conclusions."

WHEREFORE, petitioners, referring to the attached brief in support of their reasons for review, respectfully pray that this Court issue writs of certiorari directed to the Supreme Court of Minnesota to certify and send to this Court full and complete transcripts of the records herein, to the end that the cases may be reviewed and determined by this Court as provided by law, and that the decisions of the Supreme Court

of Minnesota may be reversed; and that the petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and equitable.

And your petitioners will ever pray.

William V. Bicanic, Frank Akar, George Elich, Carl Moe, Martin Wonski, Martin Dybevick and Nikola Grosdanich, in Behalf of Themselves and All Others Similarly Situated, and

Harry Czupiy, Steve Geswine, Walter L. Carlson, Joseph Skala, Jr., John Stimac, Jacob Maciag, Aili Wapola, Erick Hellman, Maynard L. Schneider, Andrew Alszewski, Alex Kangas, John Nesland, Nikola Grosdanich, Elmer Osoff, Charles A. Mueller, Joseph Schone, Victor Carlson, Edward Andresen, Charles Wapola, Carl E. Manyberg, David McMillen, in Behalf of Themselves and All Others Similarly Situated.

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